Ho Kok Thin & Ors v The Sheriff/ Registrar of the High Court Borneo & Anor

HIGH COURT (KUCHING) - SUIT NO 230 OF 1988
HAIDAR J
17 MAY 1989

Civil Procedure - Injunctions - Declarations - Pleadings - Striking out - Action against the sheriff and registrar of the court and another party - Registrar invalidating sale by auction conducted under direction of court - Fresh sale ordered by registrar - Successful bidders obtaining order for stay of intended auction - Interim injunction granted restraining other defendant from proceeding with sale - Whether stay and injunction ought to have been ordered - Whether injunction granted had indirect effect on registrar - Whether interim declaration may be granted against government - Whether reasonable cause of action disclosed - Whether registrar immune from process - Whether statement of claim frivolous, vexatious or an abuse of the process of the court - Courts of Judicature Act 1964, s 14(2) - Government Proceedings Act 1956, s 29 - Rules of the High Court 1980, O 15 r 6 & O 18 r 19

The second defendant in the instant action had obtained in Originating Summons No KG 343 of 1986 an order for sale by public auction of a parcel of land. The plaintiffs were the successful bidders at the auction and paid a sum of money into court as deposit towards the purchase price following execution of a memorandum of sale. The plaintiffs alleged that later the first defendant had purportedly and wrongly invalidated the sale by auction and refused to accept the balance of the purchase price when it was tendered and had gone on to return the deposit to the plaintiffs. The plaintiffs also alleged that the defendants intended to proceed with a fresh sale. The plaintiffs brought an action against the defendants and obtained, on an ex parte application by a summons-in-chambers (as amended), an interim injunction to restrain the second defendant from proceeding with the intended sale and an order against the first defendant granting a stay of the intended sale by auction.

The first defendant filed an application for orders, inter alia:

(i) that the order obtained by the plaintiffs be set aside; and
(ii) that the writ of summons and statement of claim be struck out as against the first defendant;
(iii) alternatively, that the first defendant do cease to be a party to the action.

The second defendant filed an application for orders, inter alia:

(i) that the statement of claim against the second defendant be struck out; and
(ii) that the name of the second defendant be struck out of the writ of summons and statement of claim and all subsequent proceedings therein.

Held, allowing the applications and dismissing the action:

(1) No injunction could be directly or indirectly issued against the government or its officers. It thus seemed clear that no injunction, permanent or interim, would be issued against the first defendant. The interim injunction against the second defendant will have the indirect effect on the first defendant, that is, the first defendant will not be able to carry out the sale by auction. This action would be caught by s 29(2) of the Government Proceedings Act 1956 and hence the interim injunctive order issued earlier against the second defendant would appear to be wrong in law as it had the indirect effect on the first defendant.

(2) The order for stay of the sale by auction was an order for stay against the action of a government office to carry out the order of the court in respect of a sale by auction. It was not a case of a stay of a court order. Further, it appeared that what the plaintiffs were asking for as against the first defendant was some form of an interim declaration in lieu of an interim injunction. There was no jurisdiction in the court to make an interim declaration in lieu of an interim injunction against the government in order to preserve the status quo until the trial of the action.

(3) It would appear that the first defendant had the power to abort the sale by auction if there was a dispute (whether it was rightly or wrongly determined by her was a separate issue) and if that be the case it then followed that she may rightfully claim immunity under s 14(2) of the Courts of Judicature Act 1964. It could not be argued that she was without jurisdiction in the matter. As the first defendant could properly claim the protection of s 14(2) of the Act there was therefore no reasonable cause of action against her. As the first defendant had been improperly or unnecessarily made a party, the proper order in the circumstances was to strike out the first defendant as a party to the action.

(4) The first defendant would appear to have the jurisdiction to postpone the sale and hence there was no jurisdictional defect and the only proper procedure open to the plaintiffs in the circumstances would be an application for an order of certiorari to quash the decision.

(5) The second defendant had nothing to do with the decision of the first defendant and it was thus clear that there was no reasonable cause of action against the defendant. The statement of claim against the second defendant was frivolous and the second defendant had been improperly or unnecessarily made a party to the action. The action in the circumstances was an abuse of the process of the court.

Cases referred to

1 *Government of Malaysia* v *Lim Kit Siang* [1988] SCR 11 (folld)
2 *R* v *Secretary of State for the Home Department, ex p Kirkwood* [1984] 2 All ER 390 (refd)
3 *International General Electric Company of New York Ltd & Anor* v *Commissioners of Customs and Excise* [1962] 2 All ER 398 (folld)
4 *Letang* v *Cooper* [1965] 1 QB 232 (refd)
5 *Pyx Granite Co Ltd* v *Ministry of Housing & Local Government & Ors* [1960] AC 260 (folld)
6 *Sungai Wangi Estate* v *Uni* [1975] 1 MLJ 136 folld)
7 *Willis* v *Yates, Coop.t Brough* 498 ER Vol 47, 177 (refd)
8 *Green* v *Pulsford* 48 ER 1105 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 14(2)
Government Proceedings Act 1956 s 29
Rules of the High Court 1980 O 15 r 6, O 18 r 19, O 53
Sarawak Land Code (Cap 81) s 148 (2)(c)
Crown Proceedings Act 1947 (UK) s 21

Cheng Hui Hong for the plaintiffs.
Khoo Guan Huat (Federal Counsel) for the first defendant.
Salang for the second defendant.

Cur Adv Vult

Haidar J: The plaintiffs, after having instituted an action against the defendants on 12 October 1988 vide Suit No KG 230 of 1988 (encl 2), filed in court a certificate of urgency dated 14 October 1988 through their counsel, certifying that the hearing of the ex parte summons-in-chambers dated 14 October 1988 bearing Suit No KG 230 of 1988 (encl 5) be expedited and set out the grounds therein. The application is made under O 29 r 1(3) of the Rules of the High Court 1980 ('RHC').

One of the principal grounds for the request of an early hearing of the said ex parte summons-in-chambers is that the defendants intended to carry out a fresh auction sale in respect of the property which the plaintiffs alleged they had successfully bid and in fact the notice of sale to that effect had been issued (exh HKT-4). The plaintiffs tried unsuccessfully to stop defendants from putting up the property in question for sale again. Hence the application is against both defendants (encl 5) for (a) an interim injunction to restrain the first and second defendants by themselves, servants or agents or appointees from conducting sale by way of a public auction, scheduled to be held on 20 October 1988 at 10 am in the Second Class Magistrate's Court, Kuching of the property specified in the schedules thereunder until ordered by the court to do otherwise; or (b) an order against the first and second defendants themselves, servants, agents or appointees for the stay of the intended auction sale of the said property which is scheduled to be held on 20 October 1988 until ordered by the court to do otherwise. It is supported by the affidavits of all the plaintiffs and one Chang Min Hen, the licensed auctioneer from the firm of CH Williams, Talhar, Wong & Yeo Sdn Bhd, who conducted the auction sale.

At the hearing of the said summons-in-chambers, at my prodding, Mr Cheng amended his prayer (a) as against the second defendant only and in respect of prayer (b) as against the first defendant only. In other words the application for an interim injunction against the first defendant was abandoned by the plaintiffs and I granted the order prayed as amended. Hence the order (encl 7) would appear to vary with the prayers as in the said summons-in-chambers. The plaintiffs gave the usual undertaking as to damages if they are unsuccessful in their action. The defendants entered appearance on 26 October 1988 (encl 9) and 22 November 1988 (encl 14) respectively. Extension of time to file the defence by the defendants was agreed to by counsel for the plaintiffs.

The background facts of the case so far as can be ascertained from the statement of claim are: The property in question is all that parcel of land together with the building thereon and appurtenances thereof situate at Ban Hock Road, Kuching, Sarawak, containing an area of 198.8 sq m, more or less, and described as lot 136 section 51 Kuching Town land district ('the said property').

The said property was sold by way of a public auction held on 20 September 1988 at about 10 am in front of the High Court precincts, Kuching pursuant to an order of the court dated 14 April 1988 on the application of the second defendant vide Originating Summons No KG 343 of 1986. The said auction was conducted by a licenced auctioneer from M/s CH Williams, Talhar, Wong & Yeo Sdn Bhd, Kuching, a firm of chartered surveyors and property consultants duly appointed by the court to conduct the said auction sale. The reserved price for the said property was fixed at $380,000 and the purchase price for the said property, at the fall of the auctioneer's hammer, was $428,000. The plaintiffs were announced as the successful bidders of the said property on 20 September 1988 for the said sum of $428,000. A memorandum of sale (exh HKT-1) was executed and the plaintiffs jointly paid $120,000 (exh HKT-2) into court as deposit towards the purchase price of the said property.

On or about 22 September 1988 it was alleged that the first defendant, in breach of the purported contract of sale of the said property, had purportedly and wrongly invalidated the said auction sale which the plaintiffs asserted was properly conducted and concluded on 20 September 1988. The first defendant, it was further alleged, also refused to accept from the plaintiffs the balance of the purchase price of $308,000 when the said sum was tendered through the plaintiffs' lawyers on 28 September 1988. Further, on or about 4 October 1988 the first defendant, despite protest from the plaintiffs made through their lawyer, had wrongfully returned the said deposit amounting to $120,000 to the plaintiffs and the plaintiffs received same under protest.

On or about 3 October 1988 the plaintiffs gave notice to the first and second defendants of their intention to challenge the decision of the first defendant invalidating the said auction sale and requested the first and second defendants not to put up the said property for sale again until the determination and outcome of the plaintiffs' action for a declaration on the validity of the first defendant's decision to invalidate the said auction sale.

According to the plaintiffs, they subsequently deposited a total sum of $428,000 into a local bank and a financial institution and said that they are therefore able, willing and ready to conclude the sale of the said property. Subsequently, the first defendant through the Federal Counsel, filed in two applications as follows:

(1) A summons-in-chambers filed on 12 December 1988 (encl 23) ('first SIC') seeking the following orders:

(a) that the order of court dated 18 October 1988 be set aside on the ground that the said order was wrong in law in any event in the circumstance of the case; and

(b) that the writ of summons and the statement of claim be struck out as against the first defendant on the ground that:

(i) it discloses no reasonable cause of action against the first defendant;
(ii) it is scandalous, frivolous and vexatious;
(iii) it may prejudice, embarrass or delay the fair trial of the auction; or
(iv) it is otherwise an abuse of the process of the court, or alternatively,
(v) under the inherent jurisdiction of the court, or alternatively,

(c) that the first defendant to cease to be a party in this action on the ground that the first defendant has been improperly or unnecessarily made a party;
(d) that costs be costs to the defendants in any event.

(2) A summons-in-chambers filed on 24 December 1988 (encl 26) ('second SIC') for an order that the proceedings be stayed, pending the full and final disposal of the first defendant's application filed on or about 8 December 1988 (I think it should be 12 December 1988 though the affidavit in support was sworn on 8 December 1988) and that costs of the application be costs in the cause.

Both the said summons-in-chambers are supported by the affidavits of Khoo Guan Huat, the Federal Counsel having the conduct of the case for the first defendant.

The second defendant also filed a summons-in-chambers dated 25 November 1988 (encl 17) under O 18 r 19 and/or O 15 r 6(2)(a) of RHC and/or under the inherent jurisdiction of the court for the following orders:

(i) that the plaintiffs' statement of claim as against the second defendant be struck out;
(ii) that the name of the second defendant, Arab-Malaysian Merchant Bank Bhd, be struck out of the writ of summons and statement of claim and all subsequent proceedings therein;
(iii) the defence of the second defendant be dispensed with until the determination of its application herein; and
(iv) that the costs of the second defendant's application herein be taxed and paid by the plaintiffs.

The grounds of the application are:

(i) the statement of claim discloses no reasonable cause of action against the second defendant;
(ii) the second defendant has been improperly or unnecessarily made a party to the action;
(iii) the statement of claim as against the second defendant is frivolous; and
(iv) the plaintiffs' action as against the second defendant is an abuse of the process of the court.

All the three applications were duly served on the counsel for the plaintiffs. I directed Encik Khoo, the Federal Counsel, to proceed with the first SIC and I will hear the second SIC after my decision on the first SIC.

Case in respect of the first defendant

(a) *No injunction to be issued against the first defendant*

The Federal Counsel submitted that no injunction, interim or permanent, can be issued against the first defendant and invoked s 29(2) of the Government Proceedings Act 1956 (Act 359) which reads:

> 29(2) The court shall not in *any* civil proceedings grant *any* injunction or make *any* order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government. (Emphasis added)

Section 29(2) has been judicially considered by Salleh Abas LP (as he then was) in the majority judgment of the case of *Government of Malaysia* v *Lim Kit Siang*[1] at p 11 where he said that no injunction could be directly or indirectly issued against the government or its officers. It thus seems clear to me that no injunction, permanent or interim, could be issued against the first defendant. No doubt, Mr Cheng abandoned his prayer for interim injunction against the first defendant and confined it as against the second defendant only but the effect of the interim injunction against the second defendant will have the indirect effect on the first defendant, that is, the first defendant will not be able to carry out the auction sale. This action, in my view, will be caught by s 29(2) of the Government Proceedings Act 1956. Hence the interim injunctive order issued by me earlier against the second defendant would appear to be wrong in law as it has the indirect effect on the first defendant.

The next question to consider is - what then is the effect of a stay order of the auction sale against the first defendant? Does it operate in the nature of an injunction? The Federal Counsel relied on the case of *R* v *Secretary of State for the Home Department, ex p Kirkwood*[2] to support his argument that it does operate in the nature of an injunction. Mr Cheng seemed to think otherwise on the ground that the issues are different. Whilst I agree that the issues may be different, what we are concerned with here is the principle pertaining to an order of stay against the action of a government officer to carry out the order of the court in respect of an auction sale. It is not a case of a stay of a court order. It was held by Mann J in *Kirkwood*[2] that a stay was equivalent to an injunction restraining the Secretary of State from exercising his executive function. At p 394 of his judgment, Mann J said:

> In my judgment the sole purpose of sub-s (2) is to prevent the subject from achieving indirectly a result which he could not achieve directly by reason of the provisions of sub-s (1).

The provisions of sub-ss (11) and (2) of s 21(1) of the English Crown Proceedings Act 1947 are in pari materia with our sub-ss (1) and (2) of s 29(1) of the Government Proceedings Act 1956. Subsections (1) and (2) of the

English Crown Proceedings Act 1947 are quoted in extenso at p 393 by the learned judge.

Further, from the ex parte summons of the plaintiffs read together with the claim as in the writ it would appear that the plaintiffs are asking, as against the first defendant, for some form of an interim declaration in lieu of an interim injunction. Clearly under s 29(1) of the Government Proceedings Act 1965 no interim declaratory order can be made. In this respect, in the case of *International General Electric Company of New York, Ltd and Anor* v *Commissioners of Customs and Excise*,[3] it was held by the Court of Appeal that an order declaring the rights of parties must in its nature be final, and accordingly s 21(1) proviso (a) of the Crown Proceedings Act 1947 (equivalent to s 29(1) proviso (a) of our Government Proceedings Act 1956) which enables an order declaratory of rights to be granted against the Crown, does not give jurisdiction to make an interim declaration in lieu of an interim injunction against the Crown in order to preserve the status quo until the trial of the action. Upjohn LJ in the said case said at F of p 400:

> As between subjects, it cannot be doubted that some form of interlocutory relief can properly be sought and might be granted, but I say no more about that. It is, however, perfectly plain that the court, in proceedings between subjects, could not grant some form of interlocutory relief in the sense of some interim declaration. When one reads on in the proviso to s 21(1), one finds, however, that, as against the Crown, an injunction cannot be granted but an order may be made declaratory of the rights of the parties. But, as Romer J pointed out in the passage which I have read, an order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties forever, subject only, of course, to a right of appeal.

Further at the last paragraph of p 400, Upjohn LJ went on to say:

> Speaking for my part, I simply do not understand how there can be such an animal, as I ventured to call it in argument, as an interim declaratory order which does not finally declare the rights of the parties. It seems to me quite clear that, in proceedings against the Crown, it is impossible to get anything which corresponds to an interim injunction. When one comes to the question of a final injunction, no doubt a declaratory order may be made in lieu thereof, for that finally determines the rights of the parties; but it seems to me quite impossible to invent some form of declaration which does not determine the rights of the parties, but is only meant to preserve the status quo.

In the result it would appear that the order granted earlier against the first defendant was wrong in law.

The Federal Counsel made reference to paras 5 and 6 of his affidavit (encl 23) and I intimated that the contents thereof should properly be deposed to by the first defendant herself to which the counsels for the defendants requested for an adjournment which was vehemently objected to by Mr Cheng, counsel for the plaintiffs. I allowed the adjournment. At the continued hearing, on reflection, I was of the opinion that the affidavit of the first defendant, though filed, would not for the present moment be relevant for consideration. In my view, it would be relevant only in the event the hearing of the declaration proper is heard by me. When the issue of whether she had the power or had properly exercised the power to abort the auction sale, the subject matter of complaint of the plaintiffs, suffice for me to say that for the present moment we are concerned with the legal issue of whether an order of stay can properly be obtained against the first defendant. As such I ordered that the affidavit of the first defendant need not be dwelt upon.

(b) *Immunity of first defendant from civil suits/no reasonable cause of action*

The first defendant next claimed that she is entitled to the protection of s 14(2) of the Courts of Judicature Act 1964. Section 14(2) reads:

> No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

The plaintiffs here are not complaining about the right of the first defendant to execute the order of the court in respect of the auction sale of the said property in question; but it is the manner in which it was executed, that is, by aborting the auction sale which the plaintiffs claimed she has no right to do on the ground that they were the successful bidders and, as such, it is alleged that there is a binding contract when they paid the deposit into court which was accepted by the court accordingly and the memorandum of sale (contract) (exh HKT 1) was duly executed. Without going into the merits of the allegations of the plaintiffs the issue is whether the first defendant has the power to abort the auction sale? I think we have to look at the Originating Summons No KG 343 of 1986 in respect of the order of sale of the said property. We have to bear in mind that the auction sale pursuant to an order of the court under s 148(2)(c) of the Land Code (Cap 81) is carried out at the direction of the court. Accordingly a summons for direction was applied by the second defendant and the deputy registrar on 7 September 1987 gave the necessary orders in regard to the auction sale of the said property. One of the orders (order no 4) reads:

> That the draft proclamation of sale together with the conditions of sale and notice of sale be drawn up by the said licenced auctioneers and after approval by the advocates for the plaintiff submit to the Registrar of the High Court, Kuching for approval.

Condition 1 of the conditions of sale reads:

> Subject to the reserve price, the highest bidder shall be the purchaser. *If any dispute arise as to the highest bidder, the*

property shall at the option of the auctioneer be put up again and resold or the auctioneer may decide the dispute. (Emphasis is mine).

No doubt the auction sale is done by an auctioneer but, it is done by him under the supervision and direction of the Registrar of the High Court. (See order no 4 quoted above). It would appear that the first defendant has the power to abort the auction sale if there is a dispute (rightly or wrongly determined by her is another separate issue) and if that be the case it then follows that she may rightfully claim the protection of immunity under s 14(2) of the Courts of Judicature Act 1964. It cannot be argued, I think, that she is without jurisdiction in this matter. If she can succeed on this ground then there is no reasonable cause of action against her. Lord Diplock in *Letang* v *Cooper*[4] at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view as the first defendant can properly claim the protection of s 14(2) of the Courts of Judicature Act 1964 there is therefore no reasonable cause of action against the first defendant. In that event the first defendant may pray for the action against her to be struck out and it follows that under O 15 r 6(2)(a) of the RHC the first defendant has been improperly or unnecessarily made a party. The proper order in the circumstances is to strike out the first defendant as a party to the action.

What then is the option open to the plaintiffs to seek redress as to their rights in this case? The plaintiffs in my view can still exercise their rights by proceeding with an action for an order of certiorari to quash the decision of the first defendant under O 53 of the RHC. It has been held in a number of cases that declaration and certiorari are concurrent remedies and not mutually exclusive. The English case directly on point is *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government and Ors*[5] where at p 290, Lord Goddard said:

> It was also argued that if there was as remedy available in the High Court it must be by way of certiorari. I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

In fact the Federal Counsel suggested that the proper remedy for the plaintiffs (taking into account the factual situation of this case) is for an order of certiorari. Mr Cheng for the plaintiffs, however, explained that he did not do so for reason of urgency. This by itself could hardly be a good reason as if the plaintiffs were to proceed with an order of certiorari immediately I am sure the first defendant will not proceed with the subsequent auction sale in the face of such an application. What he needs to do is to apply for leave ex parte immediately and after having obtained such leave, to have the order served straightaway on the first defendant.

The issue of whether a party should proceed by way of declaration or certiorari is discussed extensively by Abdoolcader J (as he then was) in the case of *Sungai Wangi Estates* v *Uni.*[6] At p 138 His Lordship said:

> But in *Heeley* v *Minister of Health* [1955] 1 QB 221, a Court of Appeal consisting of Denning, Morris and Parker LJJ, held that it had no jurisdiction to impugn by declaration a decision of a Minister made within his jurisdiction. Each member of the court emphasized that in order to decide the claim for declaration, they would need to rehear the very matter which the Minister had decided. This would be usurping an appellate jurisdiction which the court had not been given by Parliament and which it could not create.

Further at p 139, His Lordship said:

> In *Punton* v *Ministry of Pensions and National Insurance Co (No 1)* [1963] 1 WLR 186, what happened was that the National Insurance Commissioner had made a determination that the applicants, as 'persons interested' in an industrial dispute, were not entitled to unemployment benefit. They took out an originating summons asking the court (1) to determine whether they were 'persons interested' and (2) to declare that they were entitled to benefit. The Court of Appeal held that the first question had been improperly framed. The summons was therefore amended so as to ask the court to determine whether the Commissioner's decision, on the facts found by him, was right in law. A differently constituted Court of Appeal *in Punton* v *Ministry of Pensions and National Insurance (No 2)* [1964]1 WLR 226, held that the court still had no jurisdiction to answer the question. Even if the Commissioner had been wrong in law, his determination would still have been binding until it was invalidated or revoked; it was not asserted to be invalid and the Commissioner had no power to rescind his decision or substitute a new one; no benefit could therefore become payable in consequence of a declaration made by the court to the effect that the determination was wrong in law. The result of *Punton (No 2)*, supra, would seem to be that the court has jurisdiction to grant a declaration only where the decision which is being impugned is without jurisdiction and therefore void, but not where it is within jurisdiction and therefore valid, even if voidable.

His Lordship went on to further state at p 139 (right-hand column) as follows:

> It would therefore appear to me to be clear on the authorities which I have discussed and notwithstanding the equivocal decision in *Taylor* v *National Assistance Board*, supra, that I am precluded from making the declaration sought for mere error of law on the face of the record which does not result in any jurisdictional defect so as to make the award of the Industrial Court a nullity. The correct and appropriate procedure would in the circumstances have been an application for an order of certiorari to quash the award, and in my view certiorari would indeed have been the only remedy available to the applicant.

In this case, as I said earlier, the first defendant would appear to have the jurisdiction to postpone the auction sale and hence there is no jurisdictional defect and the only proper procedure open for the plaintiffs, in the

circumstances, would be an application for an order of certiorari to quash her decision. I would for the reasons given be constrained to dismiss this action with costs.

Case in respect of the second defendant

It is not disputed that the second defendant is a mere chargee and that as between the second defendant and the plaintiffs, there is therefore no direct legal relationship.

The crux of the plaintiffs' action is essentially against the decision of the first defendant and the second defendant has got nothing to do with it and it has been unnecessarily dragged to the court by the plaintiffs. This is borne out by the relief prayed for by the plaintiffs, namely,

> (C) An injunction against the second defendant by itself, servants or agents or appointees from carrying out the purported auction sale, which is scheduled to be held on 20 October 1988 until order by court to do otherwise.

It is thus clear, to my mind, that there is no reasonable cause of action against the second defendant. What is the meaning of 'a cause of action' as I said earlier, has been judicially considered by Salleh Abas LP in *Lim Kit Siang's* case[1] and I need not repeat them here. It follows therefore that the statement of claim against the second defendant is frivolous and that the second defendant has been improperly or unnecessarily made a party to the action. The plaintiffs' action in the circumstances is an abuse of the process of the court and I have no hesitation in dismissing this action against the second defendant with costs.

In view of my judgment wherein the action is dismissed by me, no order for dissolution of the injunction is really necessary, the injunction being ipso facto discharged as of course. (See *Willis* v *Yates, Coop.t Brough*[7] at p 177 and *Green* v *Pulsford*[8]).

Mr Cheng submitted that if the contentions of counsels for the defendants are held to be right then the plaintiffs are without any remedy. I am unable to agree with such a submission as I am of the opinion that the proper remedy for the plaintiffs, in the circumstances, is to apply for an order of certiorari to quash the decision of the first defendant. If the plaintiffs elected to proceed by way of declarations instead of an order for certiorari then it is a misfortune brought about by their own action.

Application dismissed.

Solicitors: *Cheng & Cheng; Dr Yaacob & Ismail.*

Reported by *PS Ranjan*

Rosita bte Amit v Tan Boon Seng

HIGH COURT (KUCHING) - SUIT NO KG 148 OF 1988
HAIDAR J
5 MAY 1989

Civil Procedure - Parties - Joinder - Action for specific performance of agreement by defendant to sell property to plaintiff - Defendant had earlier executed an absolute assignment of right, title and interest in property in favour of a bank - Defendant not defending action - Bank applying to be added as a defendant

The plaintiff had commenced an action against the defendant claiming, inter alia, specific performance of her agreement with the defendant by which the defendant had agreed to sell a piece of land with a house thereon to her. The defendant had earlier purchased the property from a property developer at a time when there was no document of title to the property. The defendant obtained a loan from the Public Bank Bhd to assist him in the purchase of the property and for which purpose he entered into a loan agreement with the bank and executed a deed of assignment by which he, inter alia, assigned to the bank all his rights, title and interest in the property as security for the loan. The bank lodged a caveat in respect of the property. The defendant had entered into his agreement with the plaintiff without the consent of the bank. The defendant took no positive steps to defend the action and the application for summary judgment under O 81 r 1 of the Rules of the High Court 1980. The bank applied to be added as a defendant to the action. In the meantime, the bank had commenced an action against the defendant to recover the sum owing to it by the defendant in regard to the loan.

Held, allowing the bank's application:

(1) Order 15 r 6(2)(b) of the Rules of the High Court 1980 allows any person to be joined as a party if it is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. In the present action it could not be said that the bank had no rights, title and interest in the property by virtue of the deed of assignment. By para (ii) of O 15 r 6(2)(b) any person may be added as a party if in the opinion of the court it is just and convenient to determine any question that may exist or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter as between him and that party as well as between the parties to the cause or matter. If the relief sought by the plaintiff to get an order of specific performance in respect of the property were granted, the rights, title and interests of the bank would be gravely and adversely affected.

(2) As the assignment was an absolute one, not purporting to be by way of charge only, the defendant, it would appear (without going into the merits), had no right to purportedly execute a sale and purchase agreement over the property to the plaintiff. The plaintiff was not competent to sue the defendant when the assignment is still subsisting and the bank had a rightful claim to be made a party to the action if not for the substitution of its name for the defendant. It followed that the application of the bank satisfied the provisions of O 15 r 6(2)(b) of the Rules of the High Court.

Cases referred to

1 *Hj Abdul Rahman bin Lisi* v *Haji Hassan bin Haji Yunos* [1983] 1 MLJ 93 (refd)
2 *Pegang Mining Co Ltd* v *Choong Sam & Ors* [1969] 2 MLJ 52 (refd)